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No. 306.

Supreme Court of the United States

October Term, 1902.

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HOMER BIRD, *Plaintiff in Error*

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the District of Alaska, Division No. 1.

BRIEF OF THE PLAINTIFF IN ERROR

MALONY & COBB
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

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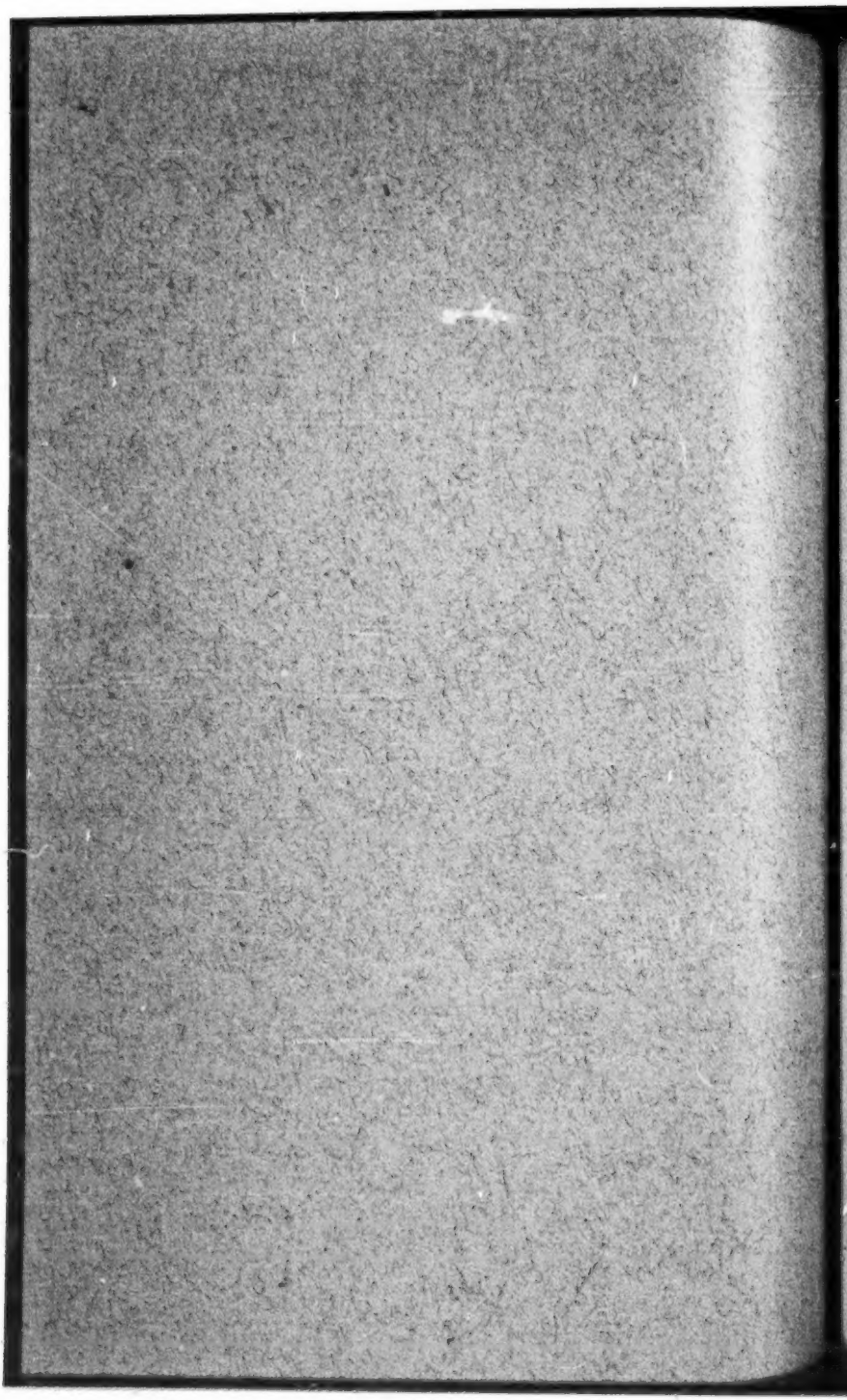

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STATEMENT OF THE CASE.

On the 9th day of November, 1899, the Grand Jury of Alaska returned an indictment against Homer

Bird, the plaintiff in error, charging him with the murder of one J. H. Hurlin, alleged to have been committed on the 27th day of September, 1898, at a point on the Yukon river about 600 miles above its mouth (Rec. pp. 1 and 2). The defendant was, tried, convicted, and December 13, 1899, sentenced to be hanged. A Writ of Error was sued out from this court, which, on February 25, 1901, reversed the judgment of the lower court, and remanded the cause, (Rec. pp. 3 and 4), (180 U. S. 356.)

The mandate was received by the Clerk of the U. S. District Court for Alaska Division No. 1, and that court assuming jurisdiction of the case, the defendant was again tried, convicted, and the death penalty imposed, (Rec. pp. 8 to 13). A Bill of Exceptions was saved (Rec. pp. 13) to 169, errors assigned, (Rec. pp. 170 to 177), a writ of error sued out, (Rec. p. 178), and the cause is now here again presented for correction and revision.

The facts developed on the second trial are substantialy the same as on the first, and which are clearly and succinctly set forth by this court in the opinion delivered, (180 U. S. 356.) We will therefore refrain from a repetition of the facts at this time. The errors assigned raise the following questions:

1st. Had the United States District Court for Alaska, Division No. 1, jurisdiction of the cause, and of the crime charged?

2nd. Did the court err in compelling the defend-

ant to go to trial before a jury had been selected according to law?

3rd. Is a witness competent to testify against a defendant on trial on a capital charge, whose true name, though demanded, has never been furnished to him on the list of witnesses served?

4th. Errors in instructions given the jury and in refusing instructions requested which will be considered in their order?

The most important question, and the one we therefore present first, is as to the jurisdiction of the court. The question is raised by the

Second, Fifth and *Eighteenth Assignments of Error.* (Rec. pp. 170, 171 and 177.)

The Bill of Exceptions shows that after the cause was remanded by this court, and was called for trial in the court below, the defendant moved the court to strike the cause from the docket and order the defendant discharged: First, because the court had no jurisdiction of the crime charged. Second, because the court had no jurisdiction of the case; but the court denied the motion, and the defendant excepted, (Rec. p. 14.) This ruling is complained of in the second assignment, (Rec. p. 170.) The court instructed the jury on the law of homicide as contained in the Revised Statutes of the United States, sections 5339 and 5341, and as defined at common law to which the defendant excepted, (Rec. pp. 47 and 48), and this is complained of in the Fifth assignment of error, (Rec. p. 171.) After the verdict was returned,

the defendant made a motion in arrest of judgment on the following grounds: First, because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the District Court for Alaska, established by the Act of Congress of May 17 1884, which was abolished by the Act of Congress of June 6, 1900.

Second, because the court has no jurisdiction of this cause, the indictment hereinhaving been returned into the District Court for Alaska established by the Act of Congress of May 17, 1884, and not into this court, and there is no law conferring upon this court jurisdiction oqer indictments returned into said court.

Third, because this court has no jurisdiction of the offence charged in the indictment herein, in this: The said indictment charges an offence under Section 5339 of the Revised Statutes of the United States, which this court has no jurisdiction of crimes except as defined in the Criminal Code for Alaska. This motion the court overruled and the defendant excepted, (Rec. pp 159, 160), and this ruling is complained of in the 18th assignment of error, (Rec. p. 177.)

In order to clearly understand the points raised it is necessary to examine the several acts of congress relating to the civil government and the courts in Alaska. The Act of Congress of May 17, 1884, established the first court in Alaska under American authority. That act, (23 Stat. L. Chap. 53), made Alaska a civil and judicial district; by Section 3 a dis-

trict court was established "for said district, with the "civil and criminal jurisdiction of District Courts of "the United States, and the civil and criminal juris-"diction of District Courts of the United State exer-"cising the jurisdiction of circuit courts, and such "other jurisdiction not inconsistent with this act, as "may be established by law." One District Judge was provided for the whole district whose residence was to be therein, and he was to hold at least two terms of court each year, one ot Sitka, and one at Wrangel in May and November, and special terms at such times and places as he saw fit. Subsequent sections provided for a clerk, four commissioners and a marshal, all appointed by the President. By Section 7 the general laws of Oregon, not in conflict with the act or the laws of the United States and not inapplicable, were extended to and made the laws of the District.

This act, together with the laws of Oregon, where the court could find any "not inapplicable," constituted the code for Alaska from 1884 to 1900. It was while this act was in force that the indictment herein was returned. The indictment, therefore, was drawn under the provisions of Section 5339 of the Revised Statutes of the United States, and alleges the jurisdictional fact that the locus of the alleged crime was in a place "under the exclusive jurisdiction of the United States." (Rec.p. 1.) Jurisdiction to try the cause was found in the clause conferring upon that court the "criminal" jurisdiction of United States District Courts ex-

ercising the jurisdiction of Circuit Courts."

On March 3rd, 1899, Congress enacted a criminal code and code of criminal procedure for Alaska entitled, "an act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said District. (Parts one and two, Carter's Alaska Code.) This act went into effect July 1, 1899, and contains a complete criminal code, and a complete code of criminal procedure. Criminal homicide is therein defined and divided into murder in the first and second degree and manslaughter, (chap. 2, p. 2), the definition as well as division differing from that found in the Revised Statutes, being taken verbatim from the Ohio Code. This act, however, if it stood alone, would not have caused any trouble since it contained a saving clause, (Sec. 219 of part one)preventing it from affecting or applying to prosecutions pending or that might be brought for offences committed prior to its passage. In other words, while the offense of murder as denounced by the Revised Statutes was abolished, the jurisdiction of the court to try for that offense was retained in the particular cases named.

But on June 6, 1900, Congress passed another act for Alaska entitled, "An act making further provision for a civil government for Alaska, and for other purposes." This act is divided into three titles: a Political Code, Code of Civil Procedure, and Civil Code, (Carter's Code, parts III, IV and V.) It covers completely every subject of legislation treated of in the act of May 17, 1884. A governor is provided for

with a salary of $4,000 per annum instead of $3,000, as under the old law; Section 4, (Id. p. 132), provides "a district court for the district, which shall be a "court of general jurisdiction in civil, criminal, "equity and admiralty causes; and three district "judges shall be appointed for the district, who shall "during their terms of office, reside in the divisions "of the district to which they may be respectively "assigned by the President.

"The court shall consist of three divisions. The "judge designated to preside over the division num- "bered one shall, during his term of office reside at "Juneau, and shall hold at least four terms of court "in the district each year, two at Juneau and two at "Skagway, and the judge shall, as near January 1st "as practicable, designate the time of holding the "terms during the current year.

"The Judge designated to preside over division "numbered two shall reside at St. Michaels during his "term of office, and shall hold at least one term of "court each year at St. Michaels, in the district, be- "ginning the third Monday in June.

"The judge designated to preside over division "numbered three shall reside at Eagle City during "his term of office, and shall hold at least one term "of court each year at Eagle City in the district, be- "ginning the first Monday in July.

Section 5 declares the jurisdiction of each division of the court to extend over the whole district, and provides for a change of venue from one division or

place to another. The act further empowers the judges to appoint their own clerks, commissioners, etc.

Section 10 provides that the "judges, (and other "officers) provided for in this act shall be appointed "by the president, by and with the advice and consent of the senate," etc., and a salary of $5,000 is provided instead of $3,000 as under the old law.

Section 25 provides that "The officers properly "qualified and actually discharging official duties in "the district at the time of the approval of this act may "continue to act in their respective official capacities "until the expiration of the term for which they were "respectively appointed unless sooner removed."

This section was evidently inserted by Congress to prevent a complete vacancy in all offices in Alaska between the passage of the act and the appointment of the new officers; as a matter of fact, on the very day the act was approved a full complement of officers was appointed under it.

Section 368 of part V (p. 432) provides, "No "person shall be deprived of any existing legal right "or remedy by reason of the passage of this act, and "all *Civil* actions or proceedings commenced in the "courts of the district before it within sixty days "after the approval of this act may be prosecuted to "final judgment under the law now in force in the "district or under this act. All acts and parts of "acts in conflict with the provisions of this act are hereby repealed.

An examination of the several acts mentioned, in the light of the foregoing provisions, leads, we think, to the following necessary deductions:

First: That the act of June 6, 1900, both by express enactment and by necessary implication, entirely repealed and superceded the act of May 17, 1884.

Second: That the district court for Alaska created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created.

Third: That in the absence of a provision in the latter act, transferring criminal causes pending in the old court to the new, the latter had no jurisdiction of indictments returned into the old court.

Fourth: A statute conferring upon a court "general" jurisdiction in criminal matters, must be construed to refer to, and to be limited by the code of criminal law enacted for the territory, and does not include jurisdiction of any offense not embodied in the code.

Fifth: The district court for Alaska, division No. 1, has no jurisdiction to try an indictment for murder drawn under section 5339 of the Rev. Stat. of the U. S., but can only try such offense as defined by the criminal code for Alaska.

We will discuss these propositions in their order.

First: The act of June 6, 1900, expressly repeals all acts and parts of acts in conflict with it. It does not purport to be an amendment of the act of 1884. Besides it covers the whole field of legislation embraced in the act of 1884. Under the authority of United States vs. Tynen, 11 Wall. 88; and of Murphy vs. Utter, decided by this court May 19, 1902, 22, Sup. Ct. Rep. 776; the act of May 17, 1884, therefore ceased to have any force or effect on June 6, 1900.

Second: If the first proposition is established, the second follows as a corrollary. This is in accord with the views of Circuit Court of Appeals for the Ninth Circuit. In the case of Tornanses vs. Melsing, 106 Fed. , at page 779, that court says: "The complaint * * * is entitled in the district court of the United States for the District of Alaska, which court was abolished by the act of June 6, 1900. That complaint, however, appears to have been filed in the District Court for the District of Alaska, Second Division, created by the last mentioned act of Congress." The congress evidently considered that they were abolishing the old court and creating a new, or the proviso, continuing in office the then incumbents, would not have been inserted, as it was in section 25 of Title I. of the act June 6th, 1900, quoted above. The Executive considered that the old court was abolished and a new court created, for on June 6th, 1900, judges were appointed to fill the three judgeships created that day. (See. 101 Fed. page VII as well as archives of the Attorney General's office). The three

departments of the government therefore seem to concur in the conclusion we have drawn.

Third: There are four elements that enter into the question of the jurisdiction of courts in criminal causes:

(a) The cause must be one which the law making power has authorized and empowered the court to hear and determine.

(b) It must have jurisdiction of the defendant.

(c) The action of the court must be invoked by some appropriate pleading presented to it and calling its jurisdiction into action.

(d) There must be a pleading on the part of the defendant, either made by him, or by the court for him.

These propositions, we think, elementary. Only the last two, however, need be noticed in this connection.

If a court should assume to try a man for his life or liberty without any pleading (indictment or information), specifying the crime charged, and legally invoking the action of the court, its judgment would of course be void. This goes without saying. Is it not then equally true that one court cannot try a man for his life on an indictment presented in another court, and which has never been legally removed into the court so trying him? To illustrate: Suppose an indictment to be returned into one of the Superior Courts of the State of Washington, the Circuit Court of the United States for the State of Washington could

not try the defendant for the offense charged, even though that offense should be one over which the Circuit Court would have jurisdiction under appropriate proceedings. Yet that is substantially what transpired in the case at bar. The indictment against the defendant, Bird, was returned into the United States District Court for Alaska, established by the act of May 17th, 1884. That Court was abolished by the act of June 6th, 1900, and a new court established. There was no transfer of pending *criminal* cases to the new court by the latter act, no order of the old court transferring the cause to the new and no authority of law for making such transfer. There is no provision of law making the clerk of the District Court for Alaska, Division No. 1, the legal custodian of the records and files of the old court. The records and files of the old court are not made records and files of the new court. In short, the government cannot put its finger upon a syllable of law authorizing the District Court for Alaska, Division No. 1, to try this case, and pronounce the judgment complained of.

Questions identical in principle with the one here presented have been often decided by this court. Such questions have arisen repeatedly, when new states have been admitted into the Union, the territorial courts abolished and new State and Federal courts organized.

In these cases it has always been held that unless a provision was made for the transfer of pending causes to the new courts the jurisdiction failed. (See McNulty vs. Batty, 10 How. 72, Railroad Co. vs.

Grant 98 U. S. 104. Ames vs. Railroad Co. 4 Dill 25 Fed. Cas. 324).

Freeborn vs. Smith 2 Wall. 160, arose in the territorial court of Nevada. A judgment for the plaintiff was removed to the Supreme Court of the territory which affirmed the judgment. The case was then taken on writ of error to the Supreme Court of the United States. Pending the writ, the act of congress under which it was brought and the territorial government were superseded by the admission of Nevada as a state. No provision of law was made for the disposition of cases pending here on writ of error from the Supreme Court of of Nevada. A motion to dismiss was made and the court postponed the hearing until the necessary legislation was passed by congress. In discussing the omission in the act as first passed, the Court says: "By this omission cases like the "present were left in a very anomalous situation. "The state could not, proprio vigore, transfer to its "courts the jurisdiction of a case whose record was "transmitted to this court without the concurrent "action of Congress. Until such action was taken "the case was suspended and the parties left to "renew their litigation in the state courts." And further along, speaking of the act curing the omission, the court says: "The passage of the act now in "question was absolutely necessary to remove an "impediment in the way of any legal proceeding in the case."

In the case at bar the impediment has not been removed. Further proceeding *was* taken, but surely

it was not *legal*. Again, in Moore vs. U. S., 85 Fed. 465, the defendant was indicted in the Territory of Utah, under section 3 of the act of July 2, 1890, which declares illegal "every combination in restraint " of trade or commerce in any territory." While the case was pending Utah became a state. While by appropriate legislation every other character of case pending in the territorial courts was transferred to the new courts, either state or federal, yet there was no provision of law "continuing the act of July 2, " now under consideration, in force in Utah after " the admission of the state; neither is there any " statute which in terms provides for the transfer to, " and trial of cases arising under that act in the " circuit court for that district." The case however was transferred to and tried in the circuit court and the defendant convicted. The circuit court of appeals for the 8th circuit held that the lower court was without jurisdiction. "The indictment," says the court, "was returned by a territorial grand jury and " filed in a territorial court, during the existence of a " territorial form of government. If, therefore, the " circuit court possessed the power and authority to " try this case, it was because of the existence of leg- " islation continuing the provisions of the statute de- " fining the offense set out in the indictment in force " after the admission of the state, and especially con- " ferring upon the circuit court for that district jur- " isdiction in such cases." So in this case. The indictment was returned into the United States District Court for Alaska during the existence of that

(the old) court and the old government. If the District Court for Alaska, Division No. 1, had power and authority to try it, it must be because of legislation specially conferring upon that court jurisdiction in such cases. Such legislation, as we have seen is wholly wanting. *Civil* cases, pending in the courts of the district, are specially provided for, but nowhere is the new court given jurisdiction over criminal cases arising under the old law and pending in the old court.

Another fatal objection to the judgment is the absence of any arraignment of, or plea by the defendant in the record. None was made in the lower court. It is true, the record on the former appeal shows that the defendant was arraigned and plead not guilty. But that arraignment and plea were entered in the old court. The records and files of the old court are no where made records and files of the new. So far as the record of the court pronouncing the judgment shows, there was no case pending, no issue to be tried. An indictment once filed in an abolished court is read to the jury, and without any plea on behalf of the defendant he is tried and convicted.

Fourth and Fifth: The District Court for Alaska, Division No. 1, had no jurisdiction of the offense charged in this indictment. Where general jurisdiction in criminal cases is conferred upon a court, the term is construed in the light of, and limited by, the crimes defined in the criminal code for the political division over which the court presides. It cannot no

more try for offenses without that code than it can for offenses committed without that territory. These propositions are elementary. Now the crime charged in this indictment is murder under the Revised Statutes of the United States and as defined by the common law. The indictment speaks for itself; and the court so told the jury (Rec. p. 147–8) Whence did the court derive the power and authority assumed? Not from the Alaska code. Not from any Act of Congress. Merely because the old court was given the jurisdiction of "United States District courts exercising the jurisdiction of circuit courts," the lower court in this case assumed that it had a similar jurisdiction. True, Congress might have conferred upon it that power, but it did not do so. As the law stands the courts of Alaska have no more jurisdiction to try the defendant on the indictment herein than they would have to try him for an offense charged to have been committed prior to the Russian cession.

And here we would close this brief, content to rest the decision on the jurisdictional question alone, were the case one of less transcendant importance to the defendant. But there are other errors assigned, which we believe would require a reversal in any event, and the defendant's life being at stake, we do not feel at liberty to omit a full presentation of them.

Following the order indicated in our opening statement we will next present the

FIRST ASSIGNMENT OF ERROR.

This assignment complains of the action of the trial court in requiring the defendant to go

to trial with and select his jury from the regular panel, because the three hundred names in the jury box, from which said panel was drawn, were not placed in said box alternately, one by the clerk and one by the jury commissioner, as required by law. (R. p. 170).

The bill of exceptions shows (R. pp. 13 and 14) that one C. D. Rogers, a person properly qualified, was properly appointed a jury commissioner to select the jury for the December term of court; that the three hundred names from which the jury was drawn were placed in the box by the clerk "in connection with C. D. Rogers." The defendant objected to being placed on trial before this jury because not selected as required by law; the court overruled the objection and the defendant excepted. This we think was error.

The Alaska code of criminal procedure, sec. 119, provides that "jurors for * * Alaska * * shall be selected and summoned in the manner prescribed by the laws of the United States with respect to the United States district and circuit courts." The latter require the jury commissioner and the clerk to place three hundred names in the box alternately, one by the clerk and one by the commissioner (Sup. R. S. U. S., Vol. I, p. 170). And the record should show that this was done. In this case it was not done. The clerk placed the names in the box "in connection with" the commissioner. They may have all been placed in the box by the clerk, with the commissioner standing by; they may have baen placed

in the box, one-half by the clerk at a time, and one-half by the commissioner. We are left to infer what was done. But if the selection was properly made, surely the government could have shown the fact and had the record corrected. By standing upon the record as made in the face of the objection, the presumption obtains that the names were not placed in the box alternately as required by law. At least the defendant, whose life has been declared forfeited to the law, has the right to insist that the law be strictly complied with. He had a right to a trial by a jury selected as the law prescribed, and when he came into court and found that the record failed to show such a jury, and he objected, it surely devolved upon the government to show a compliance with the law. This it failed to do

In Ry. Co. vs. Shane, 157 U. S., 348, this court reversed a civil case from the Indian Territory because of a failure to select a jury in a manner prescribed by the local statute. The principle controlling that decision, we think, fatal to this case.

THIRD ASSIGNMENT OF ERROR.

This assignment (R. p. 170) questions the action of the court in permitting the witness, Naomi Strong, to testify in the case. The record shows that the case was first set for trial Dec. 17 (top p. 6). On that day, after overruling a motion for continuance, the court ruled that the trial must proceed and a juror was called; whereupon the defendant objected to proceeding further at that time because no list of the jury had been furnished him and no list of the witnesses

to be used against him. The court thereupon postponed the trial two days and required the government to serve the defendant with a list of the jury and a list of the witnesses (R. pp. 8 and 9). The bill of exceptions shows (R. pp. 73 and 74) that on the list of witnesses served was the name Naomi Strong; that when this witness was called the jury, at the request o the defendant, was withdrawn, the witness eworn to answer questions to be then propounded, but not sworn in the cause. She was then questioned as to her name and it transpired that her maiden name was Naomi Strong; that she had been married and divorced; that after her divorce she again went by her maiden name; she refused to divulge her true name and the court refused to compel her to divulge it. Thereupon the defendant objected to the witness being allowed to testify against him because her true name had never been furnished him on the list of witnesses furnished him, but the court overruled the objection; the defendant excepted, and the witness was sworn and testified.

It is conceded that this is not necessary in the courts of Alaska as now established. But the court throughout the trial proceeded on the theory that it was exercising "the jurisdiction of United States District Courts exercising the jurisdiction of Circuit Courts," both as to the crime charged and the procedure governing the trial. If it was in error in that, the whole proceeding is necessarily void—the court was exercising a power it did not possess. If it was right in the theory followed it should have adhered

to it throughout—not have followed the federal practice where it was against the defendant and then the Alaska practice where it was equally against him. Now as to the law: This court is of course familiar with the requirements of the Revised Statutes in capital cases. A list of the names of the witnesses, with their residences, must be served upon the defendant two days before the trial (Rev. Stat., sec. 1033). If this is not done, and objection be made to the witness such witness whose name is not furnished cannot testify (Logan vs. United States, 144 U. S., 263). The question here is, is this requirement complied with by furnishing a mere assumed name? The purpose of the statute is evidently to give the defendant an opportunity to ascertain something of the antecedents of the witnesses and the existence of facts, if any, which would render them incompetent or otherwise affect their testimony. This purpose would often be defeated if an assumed instead of the true name was furnished. An assumed name would often mean no more than a number or the traditional John Doe. In this case the District Attorney, for some reason, was extremely anxious to keep the real name of this woman a secret. That name the defendant was entitled to have two days before the trial. He seasonably demanded it and was given a mere assumed name; he objected to her being allowed to testify, and we think the objection should have been sustained.

An understanding of the other errors we shall present, requires a brief statement of the evidence

and the issues raised thereby for the jury. We condense, stating only the essentials:

In the spring of 1898, five persons, the defendant, Chas. Scheffler, a woman known as Naomi Strong, R. L. Patterson and J. H. Hurlin, left New Orleans, La., for the Yukon to prospect for gold. They had agreed that each of the men should contribute $500 for purchasing a joint outfit to last two years. Scheffler, at the last moment, failed with his contribution and Bird furnished something over $1000. At San Francisco a small steam launch and a scow, 32 feet long by 6 feet beam, were bought, together with the usual supply of food, clothing, etc., for such an undertaking. The party sailed from San Francisco and reached St. Michael on July 4th. Shortly thereafter they started up the Yukon river with their boats, the steam launch towing the scow loaded with their outfit, arranged in the following manner: The scow was 32 feet long and 6 or 7 feet wide in the center and narrowing toward the bow and stern, and was about 3 feet deep. There was a seat across the stern, upon one end of which sat a cook stove. In front of this seat was a vacant space some 2 feet wide, and in one end of this space sat the water barrel. The whole space forward of this was filled with the outfit so arranged or packed that the top was level, and about the height of the sides of the boat. The rear end of this pile of provisions, etc., was sometimes utilized as a seat, the occupants sitting with their feet in the vacant space mentioned and facing the stern. On the starboard side of this seat, on rear end of the provis-

ions, sat the grub box. Just forward of the grub box, on the starboard side, was the bed of Bird and the woman, made down lengthwise the boat. On the other side of the boat, made down in the same manner, was Patterson's bed. Forward of these beds and made down across the boat, side by side, were the beds of Hurlin and Scheffler. On the way up from San Francisco, Patterson and the woman had passed as brother and sister, and Bird and the woman as husband and wife.

Some time early in September the party reached a point on the Yukon river about 600 miles above its mouth and about two miles below a coal mine known as Camp Dewey, and determined to go into winter quarters. For that purpose they began the construction of a cabin. About September 24th the party determined to separate, Scheffler, Patterson and Hurlin going away, leaving Bird and the woman. At the defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on the 26th of September and the tradegy occurred on the morning of the 27th.

Up to this point there is no serious conflict in the testimony. But regarding the causes that led up to the fatal difficulty, and the circumstances immediately surrounding the killing, the evidence was sharply conflicting and often squarely contradictory. The only eye-witnesses to the homicide, beside the defendant himself, were Charles Scheffler and Naomi Strong.

The theory of the prosecution, based upon the testimony of these two witnesses, was that the de-

fendant was so quarrelsome and disagreeable that on September 24th the three men, Hurlin, Patterson and Scheffler, determined to leave defendant and the woman. At defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on September 26th. In the meantime there had been disagreements about the division of the supplies—Hurlin and Patterson wanting three-fifths for their party, and defendant claiming one-half on the ground that he had paid for one-half. Defendant proposed to leave this matter to arbitration before the coal miners at the camp two miles above, but Hurlin and Patterson refused. This matter had not been adjusted on the morning of the 27th. On that morning the party sat down to breakfast in the following order: Hurlin, Patterson and Scheffler on the rear end of the pile of provisions in the scow, facing the stern of the scow, Hurlin next to the grub box, Scheffler in the middle and Patterson on his right and next the left or port side of the scow. Naomi Strong sat on the seat in the rear of the scow, immediately in front of and facing Hurlin. Defendant sat upon his bed about four feet behind and a little to the left of Hurlin and the other men. While the party were eating breakfast, defendant suddenly and without warning, rose up with his shot gun in his hands, shot and killed Hurlin, the shot taking effect in the back of the head, and shot and seriously wounded Patterson, the shot taking effect from the lower part of the left shoulder blade up to the jaw.

The defendant on the other hand claimed that up

to that morning there had been no serious disagreement. On the 24th, Hurlin, Scheffler and Patterson informed the defendant that they were going off to themselves, build a cabin and chop wood. At defendant's request they agreed to remain and help finish the cabin, which took two days. In the meantime the question of a division of supplies arose. There was only one axe, one stove and one saw. These the three men insisted on taking. On the evening of the 26th the defendant was warned by the woman that Patterson and Hurlin were conspiring to "do him up." On the morning of the 27th Scheffler and Hurlin got up first and went up on the mountain. Bird arose next and after making coffee went up to the cabin. In a short time Scheffler came up and called him down, saying they wanted to divide the provisions. The defendant came down and they were all called into the scow by the woman to breakfast. After breakfast Bird asked Patterson upon what basis they proposed to divide, and he replied in five equal shares. Bird objected to this on the ground that he had paid for one-half, and proposed to refer the matter for settlement to the miners at the camp above. Hurlin and Patterson refused to do this. Bird sat on his bunk and Patterson on his, and they began casting up how much each had paid out. A quarrel ensued. The lie was passed between Patterson and Bird; a blow was struck; the woman called out "look out, Homer, they are getting their guns!" Bird sprang for his gun, which was setting against the water barrel in the stern, and as he got it he saw Hurlin coming up

with his Winchester from under his bed, and he shot and killed him. Patterson was making for his gun in the bow of the boat and had nearly reached it when he shot him with the other barrel (Rec. 111 to 117).

The defendant also introduced the testimony of Judge A. K. Delaney, H. J. Gurr and J. H. Condit, tending to show that it is impossible for the wounds upon Patterson to have been inflicted with a shot gun discharged at a distance from him of only 4 to 6 feet, but that the wounds were such as would likely be produced at a distance of 25 or 30 feet; that if defendant had shot and killed Hurlin in the manner described by the witnesses for the government the woman, sitting in front of him, must necessarily have been wounded or killed also.

It will thus be seen that the main issue to be settled by the jury was as to which witnesses were speaking the truth; if Scheffler and Strong were telling the truth, the defendant was guilty of a cold-blooded murder. If the defendant was telling the truth it was a case of self defence. If one was true the other was necessarily false. This issue it was of the utmost importance to the defendant to have fairly submitted to the jury. In this we think the court failed in two important essentials, which are complained of in the *sixth* and *eighth* assignments of error which will now be presented:

SIXTH ASSIGNMENT OF ERROR.

This assignment (Rec. p. 172) complains of that portion of the court's charge wherein the two theories of the case, the one for the government and the one

for the defence, are outlined and clearly stated. In the instructions the court assumes (what was manifest) that if one statement is true, the other is necessarily false. But the court then tells the jury further: "But in determining this matter, under the evidence before you, you must consider that the situation of the parties at the time and all the surrounding circumstances, together with the evidence of the witnesses for the prosecution, as well as the evidence of the defendant."

The bill of exceptions shows that the charge complained of was given and excepted to (Rec. 150–151). The last clause of the charge, which we have quoted, qualified the whole instruction and permeated it with two errors.

1st. The jury was in effect told that even though they find the story told by the witnesses for the government to be untrue, they must consider their testimony in making up their verdict.

2nd. (And a more serious error.) All the evidence for the defendant, except his own, is in effect withdrawn from the jury in passing upon this all-important issue. The jury are told, not that they must consider all the evidence, but "the evidence of the defendant." Not a word about the testimony of witnesses tending to show that the story of the government witnesses was necessarily false. And this error was emphasized by the refusal of the court to give the charge complained of in

THE EIGHTH ASSIGNMENT OF ERROR.

This assignment complains of the action of the court in refusing to instruct the jury as follows:

"Gentlemen of the jury: In considering the testimony in this case, and determining the credibility of the witnesses, it is your duty to weigh and judge the testimony in the light of the common knowledge and experience of mankind, and to apply such knowledge and experience to the facts testified to. The witnesses for the government testified that the defendant shot the deceased with a shotgun, loaded with large shot, in the back of the head from a distance of not exceeding four feet; that the head of the deceased, at the time the shot was fired, was immediately between the defendant and the witness, Naomi Strong; but that none of the shot struck said witness, but were all stopped by the head of the deceased. It is further testified by the witnesses for the government that the defendant immediately shot and wounded one R. L. Patterson with the other barrel of the shotgun similarly charged with large shot, and that at the moment of such shooting the said Patterson was at a distance of from four to six feet from the muzzle of the gun; that the charge of shot took effect on the body of said Patterson from about the lower point of the shoulder upwards to a point in the left jaw underneath the ear, one coming out of the mouth and another coming out just on the right side of the nose.

"Most men in this country have more or less knowledge and experience of the effect of a shotgun discharged at close range, as to the extent of its penetration, and the extent to which the shot will scatter; and if, in the light of such knowledge and experience as you may have had, as well as the evidence in the

case, you do not believe that the shooting of the deceased occurred in the manner testified to by the witnesses for the government, you should acquit. Or if you have a reasonable doubt as to whether such shooting occurred in that manner, you must give the defendant the benefit of that doubt and acquit him. And in determining whether the shooting of the deceased occurred in the manner claimed by the government or not, it is your duty to consider all the matters testified to in that connection, and the probability or improbability of the shot claimed to have been fired at Patterson scattering at that range to the extent testified to by the government witnesses. And if the story as a whole seems improbable to you, it is sufficient to raise a reasonable doubt as to the defendant's guilt, and you must acquit him." (Rec. p. 174–5.)

(Note—This assignment is erroneously numbered and should be *tenth*, but the reference to the paging of the printed record is correct.)

The bill of exceptions shows (Rec. p. 156) that this instruction was requested by the defendant, refused by the court, and the ruling excepted to. This ruling was complained of on motion for a new trial (p. 164).

This ruling we think erroneous and highly prejudicial to the defendant. The error was one of both commission and omission! As we have already seen in considering the *sixth assignment*, the court limited the jury, in passing upon the case, to a consideration of the defendant's testimony alone—not to the whole

testimony for the defense. We then request a charge covering the omission in the instruction given, and it is refused.

It is elementary law that the defence made must be submitted to the jury under appropriate instructions. Here the court submits to the jury the whole case for the prosecution, viz.: Did the defendant shoot and kill the deceased while the latter was unsuspectingly eating his breakfast, discharging a shotgun into the back of his head, from a distance of three and a half or four feet? The defendant, on the other hand, claimed self defense, and that the shooting took place at a distance from the deceased of twenty-five or thirty feet. Now it was important for the defendant to show that the wounds inflicted were such as could not have been inflicted in the manner testified to by the government witnesses. Their story in the first place is one which, it seems to us, no reasonable man, with a knowledge of the effect a shotgun discharged at close range, could believe. Naomi Strong places Hurlin, at the moment he was shot, directly between herself and the defendant—directly in range of the gun (Rec. p. 94). Yet she was not hurt (Rec. 96–97). The man never yet lived whose head would stop a charge of heavy shot fired from a shotgun at a distance of four feet. Then Patterson's wound extended about eighteen inches up and down, from the lower shoulder blade up to under the jaw (Rec. 58). The shotgun was never yet made that at a distance of four feet would so scatter the shot. The defendant introduced three witnesses—Judge Delaney,

Mr. Gurr and Mr. Condit—the substance of whose testimony was that the wounds on Patterson could not have been inflicted in the manner described, and that Hurlin could not have been killed in the manner described without also wounding Naomi Strong. This testimony, tending strongly to corroborate the defendant, is no where referred to in the instructions, but the jury are told, in passing upon the issue, to "consider the evidence of the witnesses for the prosecution as well as the evidence of the defendant." The evidence of the witnesses named was entirely excluded from the consideration of the jury. (Oliver vs. U. S. 160 U. S., 212.

The *seventh* and *eleventh* assignments relate to the same error and will therefore be presented together.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in instructing the jury as follows:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt

would be strong, but if the attempt was made after many months of confinement and escaped comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time." (Rec. 173)

This charge the court gave over the objections and exceptions of the defendant (Rec. p. 151) and was complained of on the motion for a new trial.

The defendant, on the other hand requested the court to charge the jury as quoted in the

ELEVENTH ASSIGNMENT OF ERROR.

"The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"In this case it has been testified to, on behalf of the government, that the defendant made an attempt to escape while at St. Michaels. This was long after the offence with which he is charged is alleged to have been committed and some months after his arrest. Evidence of attempted escape, or flight, is admitted as tending to establish an inference of guilt on the part of the accused in connection with other evidence. Alone it is insufficient to establish such inference at all. And, in considering it in connection with other evidence, the jury are to carefully remember that there may have been other reasons leading to such attempt to escape besides consciousness of guilt, such as the distance to the place of trial, the natural fear that men have when charged with the commission of a grave crime, however innocent they

may in fact be, the consciousness that witnesses are hostile, or other reasons that might be entirely consistent with innocence."

This charge the defendant requested (Rec. 157) and the court refused.

The point here raised is we think conclusively settled by the case of Starr vs. U. S., 164 U. S., 627, and authorities there cited.

NINTH ASSIGNMENT OF ERROR.

"The court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the Jury: You are instructed that an accomplice in law means any one who participates, whether as principal or as accessory; and you are further instructed that an accessory is one who is guilty of an offense, not by committing the offense in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender, or by concealing or aiding the guilty party after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you cannot convict upon the uncorroborated testimony of an accomplice, and if you find and believe from the evidence that the witness Scheffler was an accomplice in the killing of the deceased, Hurlin, by the defendant, yet if you find there is no other evidence concerning the defendant with the commission of the crime except the testimony of such

accomplice, or unless the testimony of such accomplice as to the main and material facts constituting the crime are corroborated by other evidence, you cannot find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime has been committed and must tend directly to connect the defendant with the act itself and with each and every element that enters into the commission of the crime charged, and unless the testimony of such accomplice is so corroborated, you will acquit.

"Second. You are instructed that the testimony of one accomplice does not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the government, Charles Scheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, the deceased and that their testimony tending to prove the defendant guilty of the crime charged in the indictment is not corroborated by any other evidence, except their own, tending to connect the defendant with such killing, and the killing of the deceased in such manner as would make it a crime, then you must find the defendant not guilty.

"Third. You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely shows the commission of the crime and the circumstances of the

commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the material allegations in the indictment which are necessary to constitute the offence charged, and if you find and believe from the evidence that the witnesses, Charles Scheffler and Naomi Strong, were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing, and with such other facts as would make such killing a crime, is not corroborated by other competent evidence, you must acquit. And this corroboration must not be only to the fact of the killing of the deceased, but to the guilty intent and to all the facts and circumstances which would make such killing a crime under the instructions given you by the court."—(Rec. 175–176)

This instruction was requested by the defendant and refused by the court, and the defendant excepted (Rec. 163).

That an accomplice's testimony must be corroborated is settled law in the federal courts, and is expressly required by the Alaska Code. (Carter's Code, Part II §153.)

Whether this charge then was erroneously refused or not, depends upon whether there was any evidence upon which to base it. Let us see: On the very next morning after the homicide, Mr. Thompkins and Mr. Janson came to the cabin and the defendant wanted to surrender himself and tell what had been done; he was prevented by Naomi Strong and Scheffler as well as Patterson (Rec. pp. 61, 62, 98).

Shortly after the shooting, Scheffler and Bird went down to the trading post together, and no report of the matter is made by Scheffler (63, 64). Indeed the testimony shows that for six months after the homicide, the witnesses for the government and defendant lived together in the cabin, and the homicide was never mentioned; if a crime was committed the witnesses for the government concealed it. If Hurlin was murdered on the 27th day of September, 1898, by the defendant, the conduct of the witnesses for the government was such, as disclosed by this record, as to point almost conclusively to their guilty participation in it. They were more fearful than Bird himself that it would be found out and inquired into, when the whole matter was fresh. Their concealment was kept up until Patterson was dead, and these two witnesses, after a time spent alone together in the cabin, had come to "trust each other." A reading of the record, we think, makes it too clear for argument that the instruction regarding accomplice's testimony should have been given.

There are other errors assigned, but we do not deem it necessary to present them, confident that upon those presented the cause must be reversed, and such further order made as to this cause as the court may think proper.

Respectfully submitted,

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